No. 396

# Supreme Court of the United States

OCTOBER TERM, 1943.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER,

v.

WASHINGTON GAS LIGHT COMPANY.

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FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

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CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER.

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WASHINGTON GAS LIGHT COMPANY.

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CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER.

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.**

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## PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

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Washington, D. C.,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

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FRED M. VINSON, ET AL.,

v.

WASHINGTON GAS LIGHT CO.,
AND THREE OTHER CASES INVOLVING APPEALS FROM THE PROCEEDING OF THE PUBLIC UTILITIES COMMISSION IN FIXING GAS RATES UNDER THE SLIDING-SCALE.

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.**

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## PETITION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE FEDERATION OF CITIZENS' ASSOCIATIONS OF THE DISTRICT OF COLUMBIA.

Comes now, your petitioner John H. Connaughton, a Member of the Bar of this Court and respectfully petitions the Court for permission to file the accompanying Brief in said cause and have the same considered by this Court in connection with this review.

There is submitted with the original Brief filed herein original letter from Chas. Fahy, Solicitor General of the Department of Justice, and letters from Counsel for the Public Utilities Commission and the Washington Gas Light Co. which are all the parties to this proceeding, consenting to this request.

Respectfully submitted,

JOHN H. CONNAUGHTON,
316 Metropolitan Bank Bldg.,
Washington, D. C.

IN THE

# Supreme Court of the United States

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## BRIEF OF AMICUS CURIAE.

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### STATEMENT.

We desire to submit this short additional statement of the case, in order to present what we believe to be the issues here involved.

It is especially important to note that on Dec. 13, 1935 an Order was entered by the Public Utilities Commission of the District of Columbia approving a sliding scale arrangement for determining gas rates in Washington City.

This established a rate base as of June 30, 1935. This action was supported by the Peoples' Counsel of the District of Columbia acting on behalf of the people, and has consistently had the support of the people of the District to the present time. They have been and are now entirely satisfied with its operation, and desire to continue its benefits.

The proceeding before the Public Utilities Commission from which this review is taken, was initiated by a Notice given in conformity with this sliding-scale agreement.

Prior to the enactment of the Act of Oct. 2, 1942, the Administrator of the Office of Price Administration (hereinafter referred to as OPA) had intervened in this proceeding, and had taken full part in the hearings. It is true that such hearing had not proceeded to his liking, as evidenced by the many verbal clashes recorded therein, but nevertheless he had a part in the hearing, and was permitted to introduce evidence and make proper presentation of his contention.

He was accorded every privilege through his Counsel that was accorded any other participant in such proceeding, and his only objection can be that the Commission did not agree with his position as to the limits of the investigation.

Counsel for the Office of Price Administration sought to convert this proceeding, commenced by the giving of the notices he has detailed in his statement, and which was a proceeding in conformity with the sliding-scale agreement, into one, in which the entire rate base would be re-investigated, a new rate base established, and further adjustments made in accordance with his views of rating making procedure.

He sought to make this change in the proceeding without the giving of a new notice or the beginning of a new proceeding, and without producing any evidence that anything would be gained for consumers in such a revaluation proceeding.

This sliding-scale agreement was sponsored by the people of Washington, through their Peoples' Counsel, and has met the hopes of the people for a simple method of rate adjustment which could be accomplished annually, at slight expense, as compared to a valuation proceeding which would cost the consumers from $750,000.00 to $1,000,000.00 per proceeding. The experience in the application of this sliding-scale has been that it costs less than $1,000.00 per annum to make this annual investigation. This is important to the consumers, as the cost thereof finally becomes their burden under the provisions of Sec. 43-412 of the D. C. Code. And this was a proper item for the Commission to consider in determining the course it was to pursue in this matter.

The People of Washington do not want to return to the old antedeluvian periodic rate valuation proceeding, which has been so expensive to them in the past, and which has only allowed rate adjustments at long intervals of time.

## SUMMARY OF ARGUMENT.

While the petitioners seem to proceed upon the theory that "they may be heard for their much speaking" it is our conviction that the several questions presented at pages 2 and 3 of their brief, can be fully answered under three separate headings:

First: A consideration of the sliding scale of gas rates approved by the Commission Dec. 13, 1935 under Section 43-317 of the D. C. Code, to ascertain whether the Commission was justified in retaining it as a proper method of determining gas rates for consumers in the District of Columbia; or on the alternative to discard it, and proceed to make a new valuation for rate making purposes, and to investigate every question properly connected with such an investigation.

Second: To analyze the Proposal of the OPA through its intervention in this annual adjustment proceeding, ini-

tiated under notice to adjust the rates, charges, tolls, etc. in accordance with the sliding-scale arrangement. In so doing, ascertain whether such proposal was feasible and reasonably to be productive of any benefits to the consumers above that provided by the sliding scale. And to view all such proposals in the light of an expense to the consumers of approximately $750,000.00 and the possibility that replacement costs would produce a much higher rate base than the one now produced by the sliding scale.

Third: Was there a fair and impartial hearing of the issues involved in the proceeding, and did OPA have a fair opportunity to assist the Commission as contemplated by the Act? Or did OPA depart from this duty as set out in the Act and propose a visionary scheme, that was productive of no possible benefits to the consumers?

We should determine whether OPA sought to be helpful in this proceeding, and as an Intervenor in a sliding-scale annual adjustment proceeding, sought to assist the Commission in arriving at a conclusion based upon proper evidence which would carry out the spirit of the Emergency Price Control Act and the Stabilization Act. It was not their duty to control this proceeding, and if unsuccessful in such attempted control, to get mad and refuse "to play ball".

If instead of fighting with the Commission they had been helpfully co-operative much benefit might have been derived from their presence.

## ARGUMENT.

### The Sliding Scale of Rates.

The sliding scale of gas rates was established by virtue of an order of the Public Utilities Commission, dated Dec. 13, 1935, in accordance with Sec. 43-517 of the D. C. Code, and fixed a rate base of $21,000,000.00 exclusive of working capital, as a beginning point of annual adjustment of rates. This base was established as of June 30, 1935. Under this

plan the accounts of the company have been scrutinized and audited annually, and the base has been kept up to date by adding new property at cost of installation, and by deducting retired property. The earnings of the company have been properly reviewed for each annual period to see that proper charges were made for new installations, and proper deductions made for retirement, and also that proper operating expenses have been allowed, and no over-charges made. This scale was fixed on the basis of a 6½ per cent return to the company, and the rates were adjusted up or down accordingly.

This sliding scale plan operates to add the new accretions at "prudential investment" cost, as their proper valuation is one of the subjects of the annual adjustment. The natural retirement incident to the operation of such properties in the course of time will retire the property in the rate base in 1935, and the remaining property will be valued at the actual prudent cost of investment as determined annually by the Commission. This annual constant supervision also insures a proper consideration of the rights of consumers, by securing to them the lowest possible rate consistent with proper return to the investor, and also insures a fair return to the operating company.

It is our considered opinion that an arrangement of this character is too valuable to the consuming public to be bartered away upon the supposition that a present valuation and readjustment of the rate base *might* secure a reduction in rates. There is the opposite possibility that a valuation proceeding under present high prices might demonstrate that the present fair value of the Gas property is now much more than it was in 1935.

Certainly the property which has been added to the rate base because of additions made necessary by a rapidly expanding war area city, has been charged into the rate base at a higher figure than comparative property already in the rate base. It is also certain that if the property which was in existence in 1935, and still a majority part of the 1935

rate base, were now revalued, that it would command a much higher figure. So the advantage to be secured to consumers by a full rate base investigation is probably ethereal, and non-existent.

Added to the above considerations, the history of the operation of this sliding-scale gas rate arrangement has demonstrated that it has decided advantages to the consumers, because its application has secured for them rate reductions each year since its establishment, except 1937 and 1941 when no changes were made, either up or down. Only once since it was established has there been a raise in rates, and that is the one involved in this proceeding. It is interesting to note, although not germane to this appeal, that the annual investigation of 1943, produced a rate reduction which absorbed all the raise involved here.

There is certainly nothing illegal in the sliding-scale arrangement, even in the light of the Emergency Price Control Act of 1942, or the Stabilization Act of 1942. Neither of these Acts provided for any change in the method of determining utility rates. There are many methods which have been applied in the history of rate making, and the Courts have not chosen one over another, provided that they produce a fair result, and are not confiscatory. In fact this Court said in *Federal Power Commission* v. *National Pipe Line Co.*, 315 U. S. 575:

> "Rate making bodies are not required by the Constitution to follow any single formula or combination of formulas. Once a full hearing has been given, proper findings made and the statutory requirements satisfied, the Courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order as applied and viewed in its entirety produces no arbitrary result, the Court's inquiry is at an end."

There is a zone of reasonableness within which regulatory bodies are free to fix utility rates.

*Banton* v. *Belt Line Ry. Co.*, 268 U. S. 413-22-23.
*Columbia Gas Co.* v. *Commission*, 292 U. S. 398-414.
*Denver Stock Yards Co.* v. *United States*, 304 U. S. 470-483.
*Federal Power Commission* v. *Hope Natural Gas Co.*, just decided.

There is certainly nothing in the two Acts under consideration here that would disturb this well-established rule.

The principal interest which the Federation of Citizens' Association of the District of Columbia has in this present proceeding is to save for us the sliding-scale arrangement. We do not believe that OPA was justified in condemning its operation since 1935. It may be that slight adjustments might be made, which would improve the position of the consumers, and if so this can be done in a proper manner in the annual adjustments. However, nothing of this character was suggested by the OPA. Their criticism was that under changing conditions the sliding-scale is now outmoded; that its operation was not fair to the consumers.

The OPA suggested no adjustment in the operation of the terms of the sliding scale agreement, nor did they point out particular items that should be adjusted, and suggest the proper method of adjustment.

This sliding-scale is somewhat in the nature of an agreement between the utility and the Commission. Its terms were fixed by the order establishing it in 1935, and an honest attempt has been made to operate in accordance with its terms since that time.

Certainly it has been productive of some good and is not entirely worthless. In fact, it is not so worthless that we are justified in discarding it at this time of "peak" prices and spending approximately $750,000.00 to establish a new rate base, which would probably be subject to as much criticism as the present one, and be based on a much higher valuation.

The citizens of Washington do not want this sliding-scale abrogated on the slight and unsatisfactory showing made

by the OPA or suggested by them as a vague possibility in their brief herein.

**The Proposal of the Office of Price Administration.**

Regardless of the fact that this proceeding was commenced as an annual investigation of the rates, charges, etc. of the Washington Gas Light Co. as required by the sliding-scale arrangement, petitioner sought to change it to a general rate hearing. It is quite probable that if the sliding-scale arrangement had not provided for such a hearing, that no such action would have been initiated. However, under this arrangement it became the duty of the Commission to make a determination.

There has been much said about what the position of the OPA was before the Commission. When directly accused of desiring to nullify the sliding-scale agreement, they denied any such intention. There was varying criticism, all of which was interpreted as an attack upon the sliding scale as an equitable and fair program from the standpoint of consumers, and this notwithstanding there were no consumers before the Commission objecting to the sliding-scale arrangement.

Consumers had the right under the procedure obtaining to participate in the hearing without formal intervention, and could have asked the abrogation of the sliding-scale agreement. There was an appearance by some misguided individuals, but they were not attacking the sliding-scale agreement. They were asking for some adjustments in its application, which action on their part secured no assistance from the OPA.

The position of the OPA is best summed up by Mr. Justice Soper, in the opinion of the Court, unofficial print, page 14 near the bottom of the page (R. P. 440).

After setting out in consecutive order the contentions of the petitioner boiled down from many pages of random discussion and argument (R. 440), bottom page and top of following page, Circuit Judge Soper continues:

"All of these matters were discussed at great length during the extended hearings before the Commission. They were offered as reasons which, taken together required a complete rate investigation. Indeed all of the subjects were so tied together that no substantial change could be made in one without a survey of the entire field. The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was in no position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails. What he desired was an indefinite postponement of an increase in rates pending an exploratory investigation by the Commission in which he was willing to assist as best he could."

A further study of the position of the petitioner will demonstrate that he asked the Commission to pursue a course in conflict with the D. C. Code, Sec. 43-306.

The statutes in question gave the OPA, as a representative of the President the right to intervene in rate proceedings, where rates were proposd to be raised. These statutes did not change the law as to rate making procedure, but simply gave to the OPA the opportunity to assist the Commission in its labors.

We cannot believe that it was the intention of Congress in enacting these two statutes to require utility companies to operate at a loss, should changing conditions reduce their returns, so that present existing rates would not provide an adequate return. If that were true, the law of diminishing returns would soon deprive the public of the utility service involved and resources of the already over-burdened taxpayers would have to be utilized to supply the loss thus sustained.

The Commission fully considered the position of the Washington Gas Light Co., and the return which had been made under the sliding-scale for the year 1942. It scaled down the figures submitted by its own accountants, and permitted an advance which amounted to about .03 per month per customer. In order to do so, the Commission disallowed income taxes which have heretofore been prop-

erly charged to operating expenses. Certainly the Commission cannot be charged with disregarding the rights of the consumers, when they establish a new rule as to income taxes, which to say the least is very questionable, but in favor of the consumer on this doubtful issue (R. 438 top of page).

The great length to which the Commission investigated the return to the Company, its decline in revenue, expenses of operation, etc. is discussed quite fully by the Court of Appeals at page 12 of its opinion, shown at (R. 438). This consideration showed painstaking action, and its findings based upon competent evidence cannot be disturbed.

*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297-304.

*Norfolk & Western Railway Co.* v. *United States*, 287 U. S. 134.

*American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232.

If this finding and conclusion of the Commission was correct, then any lower rate would have been confiscatory. In fact, this rate is bordering upon confiscatory, unless it is a proper conclusion that all taxes in excess of 31 per cent must be borne by the utility. However, that question is not before the court in this case, as that question was not raised by the utility.

However, the petitioner, at times, seems to take the position that there can be no raise in utility rates without the consent of OPA, even though the existing rate might be confiscatory. He seeks to justify this by reference to the Emergency Price Control Act and the Stabilization Act. These Acts did not go to that extent, but simply provided that the OPA could be helpful to the Commission by producing competent evidence to help guide the Commission in its task of determining the lowest reasonable rate. If it was determined that a raise must be granted due to increased cost of production, etc. then OPA could be helpful in assisting the Commission to keep such rate at the low-

est possible level consistent with the continued operation of the utility.

Unless this is the fair construction of the statutes involved, they are unconstitutional, as seeking to take property without due process of law.

**A Full and Fair Hearing Was Had in this Proceeding, and One Which Satisfied the Requirements of the Emergency Price Control Act, and the Amendment of Oct. 2, 1942.**

We wish it to be thoroughly understood at the outset of this argument, that the Federation of Citizens' Associations of the District of Columbia is interested in securing the lowest gas rate that we can get consistent with existing conditions. We realize that if we are to have the benefit of private industry, that such industries must be permitted to operate on such a basis as to permit the investors to make the average return of other invested capital.

While we are as selfish as any other individuals, we do not desire to "kill the goose that lays the golden egg", and destroy the utility that produces the service involved. We realize that the Public Utilities Commission of the District of Columbia does not have the right or the authority to fix a rate for gas service that is confiscatory. We believe that it is the sincere desire of the Commission to give the people of this District who are consumers of the Washington Gas Light Co. product the lowest reasonable, just, fair and equitable rates that the facts and the law will justify.

We are thoroughly in accord with the atttitude and desires of the majority of the Commission. We dislike to have conditions arise which require even a very slight raise in gas rates in Washington, but the good faith of the Commission is demonstrated by their action in the following year, 1943, in which because of increase in business of the Washington Gas Light Co. they were able to reduce rates to such an extent as to entirely absorb all of the increase granted in 1942.

The situation which presents itself to us in considering this case, is this: the Public Utilities Commission of the District of Columbia had approved a sliding-scale agreement, or as it is called in the Public Utility Act, "a sliding scale of rates", Dec. 13, 1935, and established a rate base as of June 30, 1935 of $21,000,000.00. This action was taken under Sec. 43-317 of the D. C. Code. This sliding scale has operated to the satisfaction of the Company and the consumers since that time, and has resulted in a reduction in rates, except for the years of 1937 and 1941, when there was no change.

There is nothing in the Emergency Price Control Act or the Amendment of Oct. 2, 1942, that would in itself abrogate this sliding-scale, and the Act does not authorize the Office of Price Administration, acting for the President, to abrogate it. There is nothing in the Act or the amendment which would designate what method should be used in rate hearings, or that authorized the OPA to choose a method which it could impose upon the Regulatory Body. The effect of the Emergency Price Control Act was to require a full and fair hearing which existing law already required, and to allow the OPA to intervene for the purpose of presenting evidence as to the inflationary effect of a proposed raise in rates. The Act did not repeal the District of Columbia Code Section 43-317, or any other part of the Public Utilities Act. A sliding-scale arrangement is still lawful under this Act.

In short, the law regarding utility hearings was the same as before the passage of the Emergency Price Control Act, except that the OPA was permitted to intervene.

The purpose of that intervention is to permit the OPA to introduce evidence upon the question of inflation. The Emergency Price Control Act did not forbid all raises in rates, but required that such raises should only be made when absolutely necessary. The purpose was to provide an advisory agency with a national overall picture of the economic field to assist the Commission by producing evi-

dence gleaned from its national experience with the subject.

The Act, so far as it applies to public utility rates, reads as follows:

50 U. S. C. Appen. Sec. 961, in so far as applicable, reads as follows:

> "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase." (56 Stat. 765, Oct. 2, 1942, Ch. 578, Sec. 1.)

The Act to which this was supplemental and amendatory, reads in part as follows:

50 U. S. C. 942 Appendix, so far as it concerns this subject:

> "942. Definitions.
>
> (c) The term "commodity" means commodity, articles, products, and materials, ( ——— ) and it also includes services rendered otherwise than as an employee in connection with processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity; Provided, that nothing in this Act shall be construed to authorize the regulation of (1) * * * (2) rates charged by any common carrier or other public utility,"

The effect of these two quoted sections was first to withhold regulation of utility rates from the President or his

representative, the OPA, and by section 961, *supra*, to provide that in case of a raise in rates thirty days notice must be given to such representative, and consent to the timely intervention of such representative.

That is the full extent to which this legislation goes. It does not forbid raises, if increasing costs require them, but it does require notice to the representative. Intervention must then depend for its definition upon the already established meaning of the word. Intervention certainly does not mean control, as the OPA sought to define it.

The Section which deals with price-fixing grants to the President authority to make "adjustments". The Utility Commission of the country already had this power to adjust utility rates. All interested parties were permitted to intervene by the various utility statutes, as were they so permitted by the D. C. Code. This statute did not allow such intervenors to manage the proceedings but to introduce evidence germane to the issue framed by the Commission.

It is certainly a strained construction to say that the enactment of this legislation in question here would grant to the OPA something different than was contemplated by existing legislation.

The OPA had a fair opportunity to present any germane evidence, but chose to seek to change the proceedings entirely from an annual investigation under the sliding scale to a revaluation proceeding. They did this with full knowledge that present values were the highest in American history. It is hard to understand why they took this position in view of this high cost of replacement, and the expense of such a proceeding, which, according to Judge Soper at page 443 of the Record, in the last paragraph of the opinion, cost the consumers of Washington $750,000.00. Such an investigation now, in view of labor shortage and increased costs, would probably cost considerably more. It is hard for the Federation of Citizens' Associations to believe that the OPA had the best interest of consumers in mind.

In order to determine whether or not the OPA had a full and fair hearing, we must determine what kind of a hearing they requested. If they were simply participating in an annual adjustment of rates, charges, etc. under the sliding scale, then they had a full opportunity to present anything they desired which was germane to this subject. If they were trying to present evidence that had nothing to do with an annual adjustment of rates, charges, etc. under the sliding scale, then such evidence was properly excluded.

If they were seeking a revaluation of the property of the Washington Gas Light Company, and a full re-investigation of its entire rate base, and all subjects incident thereto, they were addressing the Commission upon a subject not before it, in the proceeding initiated by the Commission through the notice to which reference has been made so often here.

If that is the present contention of the OPA, then that was and is an entirely different proceeding than the one we are now considering. In such a case, it was the duty of the OPA to present evidence to the Commission which would prove the necessity and feasibility of such a rate investigation under existing conditions, and a consideration of the high cost of such a proceeding which would have to be borne by the consumers.

If this latter position is the one they now take before this Court they failed utterly to make such a showing as would justify such action. It is not sufficient to show that somebody guesses that such a rate valuation proceeding would probably benefit the consumer.

It would have to clearly appear that such a revaluation would produce a rate reduction. The Commission would not be justified in guessing that a rate reduction might result, and spend $750,000.00 of the consumers money to demonstrate that they had guessed wrong.

It was so apparent to the Commission under consideration of advancing costs of material, rising operating costs, and a general higher level of all items to be considered that such a proposal was not only useless, but highly foolish,

that the Commission properly declined to make such an investigation now.

That is really the issue upon which the OPA says it was denied a fair and full hearing. Stated bluntly, it is this: Was a valuation rate proceeding, in which the whole rate structure, depreciation, etc. would be completely investigated at a probable cost to the consumers of $750,000.00 justified under present conditions? That question was rightly answered in the negative. In connection with the nature of proof offered by the OPA in support of its contention that a valuation, etc. should now be had, the Court of Appeals said (R. P. 441):

> "The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was not in position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails."

That excerpt correctly states the extent to which the OPA sought to assist the Commission in a solution of the problem it proposed.

The Commission gave them a full, fair and equitable hearing and they produced no evidence to justify their contention.

## CONCLUSION.

The Federation of Citizens' Associations of the District of Columbia, which has been in operation for many years, and which is composed of 67 member bodies, representing a membership of approximately 70,000 as disclosed by testimony in a recent hearing, desires to inform the Court that the people of Washington, D. C., are entirely satisfied with the sliding-scale of rates for gas consumers, based upon their experience with its operation for over eight years. We have had experience with a sliding-scale of electric rates with the Potomac Electric Power Company, and this too has worked to the lasting benefit of the customers of such Company.

Our experience has led us to the conclusion that an annual adjustment of rates, charges, regulations, operating expenses, etc. is much to be preferred to expensive valuation proceedings, even though they only occur at long intervals of time. The last experience we had with the Potomac Electric Company the valuation proceeding cost us $1,000,000.00 and lasted ten years, and reached this Court twice in the course of final settlement. The valuation proceeding which finally culminated in this sliding-scale agreement here involved lasted several years, and cost the consumers of this company $750,000.00.

We would like to feel that we are through with that kind of experience, and we do not look with favor upon an attack upon this arrangement which has netted us several reductions in gas rates, under the most unfavorable circumstances.

We are constrained to believe that under normal conditions which have not existed since the establishment of this sliding-scale, that much reduction in gas rates will be experienced from year to year. That has been the experience with the sliding-scale in effect with the Potomac Electric Company where an operation of 20 years, with them has produced rate reductions for that period totalling more than $90,000,000.00 saved to the consumers of electricity in Washington.

The Public Utilities Commission of the District of Columbia had all of this information before it, when it passed upon the application of the OPA in this case to make a complete revaluation of the entire properties of the Gas Company. They now disclaim any such desire, but it is well to read just what they said during the hearing.

Instead of being helpful in seeking adjustments of the sliding-scale to eliminate inequities, they referred to the sliding-scale as the "sacred cow" of the Citizens' Associations.

It is one thing to criticize the sliding-scale, and quite another to offer helpful evidence to adjust inequities. The

former, the OPA did as evidenced by a voluminous record, which was largely unnecessarily contributed by this criticism rather than producing helpful assisting evidence to revise the sliding-scale along proper lines.

We respectfully suggest to this Court that there is nothing wrong with this sliding scale that cannot be properly adjusted and saved to the consumers. And certainly nothing was suggested in the way of evidence that would assist the Commission one particle in making a proper adjustment.

There was plenty said by way of argument, but argument does not constitute a foundation upon which the Commission can base findings of fact. It is necessary to produce evidence.

Much has been said about the denial of a fair hearing. The fairness to be observed is toward the consumers of the Gas Company, and a proper consideration of the question of inflation. The OPA has no other interest in this proceeding.

When invited to make a showing upon the inflationary effect of the proposed action of the Commission, the OPA did not produce or tender any evidence upon this subject.

If it, the OPA, as distinguished from the consumers of gas, were denied a fair hearing, it was because of their own neglect and refusal to co-operate with the Commission to assist it in reaching a fair conclusion based upon the evidence. Their attitude was rather that of demanding, first a revaluation, and second, that no raise in rates be allowed regardless of what the evidence might show.

The OPA chose to ally themselves with the minority Commissioner in an effort to embarass the majority of the Commission in a proper performance of its duty.

Had the Commission followed the leading of the OPA and made findings based upon such evidence as they produced and have ignored the findings and computations of the accountants and experts of the Commission, their find-

ings unsupported by any evidence would have been subject to annullment.

The Commission accorded to all parties a fair opportunity to produce anything they considered germane to the issues involved; examined the books and records of the Gas Company and made such adjustments as the evidence justified, and then applied the facts disclosed to produce the findings which are the basis of its final adjudication.

The only challenge of a fair hearing to the OPA, which is not a consumer and does not represent any consumer interests, but is simply an emergency to help stabilize prices, that can be made, is that the proceeding was not converted into a thorough rate revaluation proceeding in which the Commission would have began an expert revaluation of the properties of the Gas Company, and concluded such proceeding in the next half dozen years, at an expense of from three-quarters to a million dollars, which we consumers would have had to pay through an allowance as a proper operating expense under the D. C. Code. That refusal was certainly not erroneous, but was the exercise of good judgment in the interest of such consumers.

We say again, that if OPA failed to get a fair hearing under its interpretation of what a fair hearing is, it was because of its own conduct in not showing the necessity for such a drastic and far-reaching proceeding in the midst of a war emergency; and because, of course, it could not make a showing of substantial evidence which would justify so ridiculous course of action. Such a request disregarded economic stabilization and the best interest of consumers, who pay the bills. The expenditure of $750,000.00 cannot be justified as a proper stabilization item of evidence.

Every unnecessary expenditure of money and employment of man-power must be consistently avoided in this time of emergency. Certainly representatives of OPA did not realize the effect of their request or they would not have insisted upon such a course in this proceeding.

We submit that there was no error in the proceedings of the Commission in this hearing at issue here, and that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 396.—October Term, 1943.

Fred M. Vinson, Director of Economic Stabilization, etc., et al., Petitioners,
*vs.*
Washington Gas Light Company and Public Utilities Commission of the District of Columbia.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 27, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

Certiorari was granted in this case, at the instance of the Director of Economic Stabilization and the Administrator, Office of Price Administration, of the United States, to review a rate order of the Public Utilities Commission of the District of Columbia. The application and effect of the Emergency Price Control Act of 1942,[1] and the Act of October 2, 1942,[2] are involved.

The petitioners, who were intervenors before the Commission, appealed from its order to the District Court of the District of Columbia, which set aside the order as arbitrary and illegal.[3] The Court of Appeals for the District of Columbia reversed the District Court.[4] Understanding of the questions presented requires a detailed statement of their historical background.

The Commission was created, and its powers and duties defined by Act of Congress in 1913, supplemented in 1926, 1935, and 1939.[5] References will be to the District of Columbia Code, 1940 edition. The statutes require public utilities within the District to furnish safe and adequate facilities, just and reasonable service, at reasonable, just and nondiscriminatory rates, and to obey the lawful orders of the Commission (§ 43-301). There are detailed

[1] 56 Stat. 23.
[2] 56 Stat. 765.
[3] 48 F. Supp. 703.
[4] 137 F. 2d 547.
[5] c. 150, 37 Stat. 974; c. 8, 44 Stat. 920; c. 742, 49 Stat. 882; c. 40, 53 Stat. 569. D. C. Code, 1940 Ed. Tit. 43 §§ 101-1006.

provisions respecting rates and depreciation (§ 43-315). For the purpose of its functions, the Commission is directed to value "the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation." (§ 43-306.) Nothing in the statute is to be "taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested." But no such arrangement is lawful until found by the Commission, after investigation, to be reasonable, just, and not inconsistent with the purposes of the Act. Such arrangement must operate under the supervision and regulation of the Commission, may be altered and amended, and may be terminated by the Commission (§ 43-317). Usual powers to fix rates, charges, and make rules and regulations are conferred (§ 43-411). The Commission may make rules and regulations to govern its proceedings and to regulate the mode and manner of investigations and hearings before it (§ 43-402). Appeal from its orders is authorized, and the scope of review defined (§§ 43-705 to 43-706).

Pursuant to its authority, the Commission initiated in 1931, and concluded in 1935 a proceeding for the valuation of the property of the Washington Gas Light Company, at an expense of some $750,000, and arrived at a depreciated rate base as of 1932. It then entered upon a further inquiry as to rates. After this had lasted some time it approved and adopted a sliding scale arrangement, which involved a rate base, to be adjusted annually by adding net property additions at cost, a rate of return, and a rate of accrual to retirement reserve, in the light of which the rates of the company were to be adjusted annually. It found that the plan was practical and would be advantageous to all parties interested. This plan calls for an annual determination of the rate of return earned during the "test year", and of the amount available for rate increase or decrease for the succeeding "rate year" and schedules and regulations to accomplish such increase or decrease. Such determination is to be made after public notice and opportunity for hearing. The plan defines a rate year as "the twelve months' period from September 1st to August 31st, inclusive," and the test year as "the twelve months'

period ending . . . June 30th preceding the rate year." At the inception of the plan, rates were reduced by some $800,000 annually, and subsequent annual hearings and determinations resulted in rate reductions in each year after 1935, except in 1937 and 1941, when no changes were made.

The duration of the system was not prescribed but in its order the Commission stated that it construed the statute to permit a termination upon reasonable notice, and found that ninety days' written notice of termination by Commission or Company would be reasonable.

March 20, 1942, the Commission issued its order of investigation in conformity with the sliding scale arrangement. After preliminary investigation by its agents and the representatives of the company, the Commission, pursuant to statutory requirement, issued, on July 21, 1942, notice of hearing as to rates, charges, and regulations which were to become effective September 1, 1942, in accordance with the sliding scale arrangement. The Price Administrator was given leave to intervene and was represented at a prehearing conference and at all hearings, and his counsel was permitted to cross-examine witnesses and to offer testimony. These began August 18 and continued on August 19, September 4, 8, 11, and 14, and closed on the last named date. The Commission stated that it would welcome testimony with relation to the aims and purposes of the Office of Price Administration during the national emergency and the relation of those aims and purposes to the proceedings, and expressed the hope that the Administrator, as intervenor, would develop testimony along lines which would enable the Commission to determine whether an increase should be granted in view of the national emergency. The Administrator's counsel offered evidence, cross-examined witnesses, argued and filed a brief.

On application of other parties, the proceedings were reopened and further hearing had September 30th. Counsel for the Administrator participated and filed a second brief. The hearings were again closed, and, October 13, the Commission issued its findings, opinion and order.

The petitioners' standing in the proceedings deserves notice. Section 302(c) of the Emergency Price Control Act of 1942[6] pro-

[6] 56 Stat. 36, 50 U. S. C. § 942(c).

vides: "Nothing in this Act shall be construed to authorize the regulation of . . . rates charged by any common carrier or other public utility."[7] The admission of the Administrator as intervenor was, therefore, not pursuant to statute but was governed by the Commission's rules. The Commission had provided for intervention in its rules. Rule 7.3 is: "The Commission may grant or deny a petition for leave to intervene, or may grant the petition upon such conditions and limitations as it may prescribe." Rule 7.5 is: "The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

After final submission, and before promulgation of the Commission's order, the Emergency Price Control Act was amended by the Act of October 2, 1942, which, while prohibiting the President from suspending that portion of the original Act exempting public utilities from the scope of the statute, provided: "That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

On the showing of the Commission's staff, the company would have been entitled, under the sliding scale, to an increase in rates of $324,718. The increase approved by the Commission was $201,424, effective September 1, 1942. In its order, however, the Commission directed the company's attention to the provisions of the Act of October 2, 1942, and quoted its language. Accordingly the company, October 14, 1942, served notice upon the Director of Economic Stabilization, who had been designated for the purpose by the President, of the proposed increase in rates together with a copy of the Commission's order and later consented to his intervention. The court below has found that the requisite notice and consent to intervention was given by the company in accordance with the Act.

[7] Compare Davies Warehouse Co. v. Bowles, No. 112 October Term 1943.

Counsel who had participated in all the prior proceedings for the Administrator filed with the Commission October 19 a petition in the name of the Administrator, and on behalf of the Director, asking that the Commission vacate its order and reopen the proceedings to allow the Director to intervene. The Commission reopened the proceeding and set a hearing for November 2 "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by order No. 2401, and intervention is granted for such purpose." When the reopened proceedings came on for hearing, the same counsel who had theretofore participated in behalf of the Administrator appeared before the Commission, offered no witnesses, but renewed a motion previously filed that the proceeding be reopened "without restriction as to the type of evidence to be presented" and that the Commission vacate its order. The motion was denied, the Commission announcing that it was ready to receive evidence in accordance with the order reopening the proceeding. The petitioners offered no evidence. On being asked whether they had any testimony to present in accordance with the order to reopen the proceedings they asked for a continuance so that they might consult their associates. The request was granted. On November 4, counsel recalled a witness for further examination but offered no other evidence. The proceedings were then closed for the third time without the offer of any testimony relating to the national economic policy developed under the Emergency Price Control Act as amended "and the effect thereon of increase in rates or charges of common carriers or other public utilities."

The Commission reconsidered the record and the testimony and, November 9, issued its order in which it reviewed the proceedings and found that the evidence adduced failed to show that the rates authorized by order No. 2401 were unduly inflationary. It denied the Director's petition to vacate the order. Thereafter the company put the new rates into effect as of November 16th. On appeal by the petitioners, the District Court held that the action of the Commission, in the light of the record, was arbitrary and illegal, and vacated the order. The Court of Appeals reversed, holding that the Commission had afforded petitioners full opportunity for a hearing upon any question which, under

the law and the rules of the Commission, was open in the proceeding and that it was not arbitrary or illegal for the Commission, on the record made, to deny the abandonment of the sliding scale plan and the prosecution of an entirely new rate investigation involving fair value, depreciation, rate of return and other elements commonly considered in such an investigation.

The petitioners seek vacation of the order on the ground that the Commission denied them a full and fair hearing. This contention is based upon the substantive contention that under the Acts of January 30 and October 2, 1942, they were entitled to demand that the Commission enlarge the scope of the hearing and convert the inquiry into one whether an increase of rates was necessary to the company to prevent hardship. The Commission, on the other hand, insists that it was entitled to conduct the proceedings in accordance with its statutory powers as they existed prior to 1942, and, at most, accord the petitioners a full hearing as to the effect of any order in its relation to inflation in the war emergency. Thus it appears that the controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances.

In view of the petitioners' insistence that they were entitled, in effect, to control and direct the inquiry without regard to the statutory powers of the Commission, we shall first examine the extent of the authority conferred upon petitioners by Congress.

The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of "commodities", which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase.

It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they

were approved by the President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body "he had nothing to say about its decision", was made and not contradicted on the Senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles*, No. 112 October Term 1943, was careful "to avoid paralyzing or extinguishing local institutions". Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.

If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which was not shown to be necessary to prevent actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra*, as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers.[8] This we are unable to do.

[8] Davies Warehouse Co. *v.* Bowles, *supra*; City of Yonkers *v.* United States, — U. S. —,

The other contention of the petitioners stems from their view as to the effect of the Emergency Price Control Act and the stabilization Act. They insisted below that they were denied a fair hearing because the Commission refused, in the current proceeding, to alter and enlarge the scope and the character of the inquiry. It will be remembered that, under the Commission's existing order, a termination of the sliding scale arrangement required ninety days' written notice. There was no application of any rate payer or any purpose of the Commission in the spring of 1942 to abrogate the arrangement. On the contrary, the Commission gave the required notice for the usual annual adjustment under the plan; and, after the necessary investigations by its agents, gave notice of hearing with respect to such adjustment. At that point, and at a time when no notice of increase of rates was required by any Act of Congress, the Administrator, upon his application, was permitted to intervene in the proceeding.

In his petition, and at the hearings, he asserted and reiterated that he had the right to go into the propriety of the rate base, the operating expenses, including depreciation expenses, taxes, and rate of return, summarizing his demand as "a full and complete inquiry for the purpose of determining what are fair and reasonable rates." . . . The petitioners now insist that their desire was limited to examination of certain factors involved in the sliding scale. But the courts below did not so understand. The District Court, which sustained the appeal, said: "The Commission was requested to reconsider the basic principle of the sliding scale arrangement" . . . . . The Court of Appeals said "the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." These characterizations of the Administrator's contentions before the Commission are supported by the record.

If we consider the petitioners' present position we find that the Commission heard all evidence offered, and says it weighed it. The Administrator urged that the straight line method of depreciation embodied in the sinking fund plan must be discarded in favor of a sinking fund method under the force of de-

cisions of this court, a position unsupported by our cases, and evidence was offered to show the result which would ensue the substitution. Some testimony was adduced as to rate of return, and the Commission's report shows this was considered. In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and over-all conditions in the national economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

The judgment is affirmed.

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Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MURPHY concur, dissenting.

This case goes hand in hand with *Davies Warehouse Co.* v. *Bowles*, 321 U. S. —. That decision expanded the "public utility" exemption in the Emergency Price Control Act to include a wide variety of enterprises. The present decision illustrates the value of that preferred treatment.

The Stabilization Act prohibits any "utility" from making "any general increase in its rates or charges which were in effect on September 15, 1942" without giving the President's agent the right to intervene in the proceedings. The present decision goes far towards making that provision ineffective. It allows the commission so to shape the issues of the rate proceeding as to exclude the data most relevant to a determination of whether any rate increase should be allowed. The power of a commission to shape the issues as it desires and to restrict the Director of Economic Stabilization to those issues is not a power which is apt to be neglected. The Director may of course proclaim against rate increases. But he does not need the right to intervene to prove that rate increases are inflationary. That is self-evident. The right to intervene, if it is not a right to introduce relevant data bearing on the true earnings and returns of the utility, is an empty right indeed.

I agree that Congress did not transfer rate-making powers from the commissions to the Director. I agree that Congress must have contemplated that some rate increases might take place or else it would have treated the whole problem quite differently. But I find not the slightest indication that the Director was to be denied a full hearing. And I do not see how a full hearing could be accorded unless he was given the opportunity to establish, if he could, that the case under consideration showed no real hardship, that wartime demands were not causing the company to suffer, that its financial integrity and its ability to render service remained unimpaired, that its property was not being confiscated, that it was not being treated unfairly as compared with other companies.

We are told that this company has an inflated rate base of some $1,000,000. We are told that its excessive charges for depreciation expense were over $225,000 a year as compared with the rate increase of about $200,000 a year. We are told that a full hearing would have disclosed that the company was in fact earning more than 6½%. I do not know what the evidence would show. But an offer of proof in a rate case could not be more relevant.

I believe, moreover, that when Congress halted general rate increases and gave the Director a right to intervene, it did not sanction rate increases regardless of need and regardless of inflationary effect. I think it meant to make utility commissions at least partial participants in the war against inflation and gave them a sector of the front to control. Though it did not remove the established standards for rate-making I do not think it intended utility commissions to proceed in disregard of the requirements of emergency price control and unmindful of the dangers of general rate increases. To the contrary, I think Congress intended that there should be as great an accommodation as possible between the old standards and the new wartime necessities. The failure of the commission to make that accommodation is best illustrated perhaps by its treatment of taxes. The commission allowed the company to deduct as operating expenses all excess profits taxes and income taxes up to and including 31%. That this amount includes wartime taxes is evident from the fact that the highest corporate tax rate which prevailed from 1936 to 1939 was 19%. We all know that the extraordinary expenditures in-

curred for the defense of the nation started with the Revenue Act of 1940. It has been accepted practice to deduct income taxes as well as other taxes from operating expenses in determining rates for public utilities. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 399. But this is war, not business-as-usual. When income taxes are passed on to consumers, the inflationary effect is obvious. And it is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed.